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THE RATIONALE OF THE RECOGNITION OF FOREIGN DIVORCES IN NEW YORK

ARTHUR LENHOFF†

I

Preliminaries

"Above all stick to words."

("Vor allem haltet Euch an Worte")

Goethe, Faust I (Mephistopheles' talk to the student).

IN ONE of his recent opinions on a conflict of laws case, Mr. Justice Frankfurter stated: "Conflict-of-law problems have a beguiling tendency to be made even more complicated than they are."¹ This is certainly true of the problems which center around divorces obtained in a foreign state. Musing on them in relation to the so-called estoppel problem, a New York judge wrote recently that it may not be easy to detect special consistency in the mass of the court decisions.² Naturally, if a lawyer, guided only by the stock word "estoppel," reads the cases consecutively summarized in a digest, he must be bewildered.

Examining the cases more thoroughly one finds, however, two things. In the first place, one observes again the psychological triumph of association of ideas over dialectics. Estoppel slipped into a New York decision on a foreign divorce case more than fifty years ago,³ and it was thereafter frequently caught up because of the illusory effects of its merely allusory use. Like other catch words, the incessant uncritical repetition of the word "estoppel" has bred faulty concepts and often inhibited the correct approach to the facts to be adjudicated.

In this way, estoppel is spoken of in connection with foreign divorces when it is intended to indicate that certain conduct of a party might preclude him from challenging the divorce decree. To be sure, such preclusion does not square with what the word "estoppel" usually connotes. Ordinarily, the doctrine of estoppel connotes the denial to a party of the right to prove a fact to the detriment of his opponent, who had relied on that fact or on the conduct of the former and changed his legal posi-

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1. Vanston Bondholders Protective Com. v. Green, 329 U. S. 156, 169 (1946).

2. Rosenberg v. Perles, 182 Misc. 727, 50 N. Y. S. 2d 24 (Sup. Ct. 1944).

3. Matter of Swales, 60 App. Div. 599, 70 N. Y. S. 2d 220 (4th Dep't 1901), *aff'd on opinion below*, 172 N. Y. 651, 65 N. E. 1122 (1902). Van Prunst, P. J., properly rejected the use of the term "estoppel" in Matter of Morrison, 52 Hun 102 (N. Y. 1889), *aff'd mem. sub nom. In re Freyh's Estate*, 117 N. Y. 638, 22 N. E. 1130 (1889). Outside New York, Ellis v. White, 61 Iowa 644, 17 N. W. 28 (1883), had used the word "estoppel" as against the spouse who had accepted benefits granted under the divorce.

tion accordingly. However, these requirements do not apply to the so-called estoppel to challenge foreign divorces. The doctrine may be invoked regardless of the belief of the one spouse in the validity of the decree and of any change in the position of the other spouse. Even if the challenger was firmly convinced that the decree which he procured was valid and learned only later of its vulnerability, his challenge of the decree may effectively be met with the objection of a so-called estoppel.⁴ The courts are aware of the misnomer;⁵ and sometimes admit it or speak of "quasi-estoppel."⁶ For the moment it may suffice to state that the doctrine results in the preclusion of a party from showing the vulnerability of the foreign divorce.⁷ To say so is to refer to the effect, and not to what may produce that effect.

On the whole the results arrived at by the courts are reasonable despite the impossibility of establishing strict rules from the cases. This article will endeavor to demonstrate a sound rationale for these cases, although the opinions point to it only infrequently and blur it by the indiscriminate resort to that weasel word "estoppel." It is thus our task to make this rationale more articulate. This undertaking is all the more important because a correct classification demonstrates that there is order where chaos seems to prevail.

The first approach must proceed from the undisputed rule that the public policy of the forum is limited by the Federal Constitution,⁸ in so far as it seeks to deny recognition to foreign divorces but is not in so far as it accords recognition. A state must not refuse to give full faith and credit to the decree of a sister state in which at least one party had acquired a domicile, even if service of process on the other party was merely one of the substituted types of service. The constitutional provision refers to a duty, not to a right, of the forum. If the forum recognizes a divorce decree of a sister state even though sound doubts in the latter's jurisdiction obviate any obligation to do so, no constitutional command such as due process would be violated. *A fortiori*, there should be no objection to such a result where the state of domiciliary origin of the parties is itself the forum (as will be assumed in this paper).

In the second *Williams v. North Carolina* case, the Supreme Court

4. *Bruguere v. Bruguere*, 172 Cal. 199, 155 Pac. 988 (1916); *Geisselman v. Geisselman*, 134 Md. 453, 107 Atl. 185 (1919).

5. New York Court of Appeals in *Krause v. Krause*, 282 N. Y. 355, 26 N. E. 2d 290 (1940).

6. "*Castellani*" v. "*Castellani*," 176 Misc. 763, 28 N. Y. S. 2d 879 (Dom. Rel. Ct. 1941), *aff'd sub nom.* *Capaldo v. Capaldo*, 263 App. Div. 984, 34 N. Y. S. 2d 400 (1st Dep't 1942).

7. *Krause v. Krause*, 282 N. Y. 355, 360, 26 N. E. 2d 290, 292 (1940).

8. U. S. CONST. Art. IV, § 1

distinguished, with respect to the binding force of a foreign decree, between the parties who had had an "appropriate opportunity to present their contentions" on the one hand, and the "state of domiciliary origin" on the other.⁹ Failure to litigate a question which the parties had the opportunity to litigate, has at all times been deemed to conclude them.¹⁰ However, to the state of domiciliary origin, the matrimonial domicile, is reserved "the right" (it was the Supreme Court which referred to that "right") to ascertain whether there was domicile in the state of rendition.¹¹

Why has the state this right? The Supreme Court answered by stating that otherwise the "policy of each state in matters of most intimate concern could be subverted. . . ."¹² Consequently, where it is the policy of the state to recognize a foreign decree if the defendant was personally served in the foreign state and appeared personally, a decree thus obtained squares with the public policy of the domiciliary state. True, the divorcees might be deemed domiciliaries of the state of the forum according to its own legal concept, but is it not for the domiciliary state itself to set up the safeguards for its interest in the family relation of its own people? Does not the state define its own public policy? According to the New York Court of Appeals it is the judicial records, in the absence of statutory declarations, from which one must learn the articulate expression of the state's public policy.¹³

As it will presently be observed, judicial decisions demonstrate unequivocally that the liberal attitude of New York conflicts of law towards the recognition of vulnerable foreign divorces rests upon the consideration given to the contacts between the parties and the state of rendition. Naturally, the degree to which the parties physically and jurisdictionally were involved in the foreign domain may vary. The involvement may shade from the domicile of both spouses in the divorce jurisdiction into a mere *ex parte* application for divorce by one spouse without personal service or appearance or acceptance of the judgment by the other. The gradations in the intensity of the ties between the parties and the foreign proceedings will be a good indicator of the extent

9. *Williams v. North Carolina* (2d case), 325 U. S. 226 (1945).

10. *Chicago Life Ins. Co. v. Cherry*, 244 U. S. 25 (1917); *Kinnier v. Kinnier*, 45 N. Y. 535 (1871); *Frost v. Frost*, 260 App. Div. 694, 23 N. Y. S. 2d 754 (1st Dep't 1940).

11. In the absence of real litigation on the jurisdictional question, *Williams v. North Carolina*, 325 U. S. 226, 230 (1945).

12. *Id.* at 231.

13. *Straus & Co. v. Canadian Pacific Ry.*, 254 N. Y. 407, 173 N. E. 564 (1930); *Crouch, J.*, dissenting in *Mertz v. Mertz*, 271 N. Y. 466, 475, 3 N. E. 2d 597, 600 (1936); *Glaser v. Glaser*, 276 N. Y. 296, 301, 12 N. E. 2d 305, 307 (1938), referring to *People v. Hawkins*, 157 N. Y. 1, 12, 51 N. E. 257, 260 (1898).

of the recognition given by New York courts to the foreign divorce and will, therefore, substantiate the rationale upon which these courts have approached the subject of vulnerable foreign divorces.

II

Lemmata si quaeris cur sint adscripta, docebo: Ut, si malueris, lemmata sola legas.

Martialis Epigrammata XIV, 2.

Divorces Based Upon Personal Jurisdiction Over Both Parties

Where it is doubtful whether the plaintiff had established a domicile in the state of rendition, the forum must recognize the foreign decision only if the question of domicile had been litigated there. If not, the forum may still fully honor the foreign divorce if both parties were before the divorce court and the defendant participated in the proceeding. Not all the states have taken this view, which might be called a personal-jurisdiction approach. Such a view takes into account the *in rem* aspect of matrimonial actions which view can be justified solely for the practical reason that otherwise dissolution of a marriage might be made impossible if the defendant, being a non-resident, could not be served personally within the state.

Consequently, where the defendant is personally served with process, he is granted the opportunity to present his case to the court. In brief, the conceptual source of the New York policy lies in the assumption that the proceedings in any one of the sister states entail the same guarantees for fair play and justice as do those in the home state, and that personal participation in the proceedings strengthens the safeguards against collusion and fraud the same as a domiciliary proceeding would do. This policy, of course, is not that of all the several states. This difference of opinion may explain why the Restatement of Conflicts of Laws contains a *caveat* stating that the Institute expresses no opinion on the question whether by his appearance in the foreign divorce proceeding a party is foreclosed from attacking the judgment upon jurisdictional grounds.¹⁴ New Jersey¹⁵ and Massachusetts courts, the latter relying on a policy statutorily defined,¹⁶ still refuse recognition to a

14. *I.e.*, ". . . whether and how far a party *appearing* and *participating* in the proceedings in a court of any state is precluded from subsequently questioning the jurisdiction of the court over the *subject matter* of the action in the courts of that state or any other state if the court in which he appeared purported to render a judgment against him." (Italics added). RESTATEMENT, CONFLICT OF LAWS § 451 (1934).

15. *Giresi v. Giresi*, 137 N. J. Eq. 336, 44 A. 2d 345 (1945).

16. MASS. ANN. LAWS, c. 208, § 39 (1933): "A divorce decreed in another jurisdiction according to the laws thereof by a court having jurisdiction of the cause and of both

divorce obtained in a sister state by a citizen although it is based upon personal service on the defendant in that sister state and on the personal appearance of both spouses; the Massachusetts courts recognize such decrees only if they concern non-citizens.¹⁷

In contrast, California,¹⁸ Washington,¹⁹ and New York do not deny the interest and the power of the state of rendition to dissolve the marriage of parties, provided they appeared before the divorce court and the defendant was personally served there. An unbroken line of decisions rendered by the New York Court of Appeals bears out this proposition. The line begins with *Kinnier v. Kinnier*,²⁰ decided in 1871, and ends with *Matter of Rhinelandcr's Estate* for the time being.²¹ In between the two cases fall such important decisions as *Guggenheim v. Wahl* (1910),²² *Tiedeman v. Tiedeman* (1919),²³ *Gould v. Gould* (1923),²⁴ *Borenstein v. Borenstein* (1936),²⁵ *Hess v. Hess* (1937),²⁶ and *Glaser v. Glaser* (1938).²⁷ The Court of Appeals now has an opportunity to confirm this policy, evinced repeatedly for the last seventy-five years, in the case of *Shea v. Shea*,²⁸ decided a few months ago in the Second Department of the Appellate Division²⁹ and now pending in the Court of Appeals.³⁰

the parties shall be valid and effectual in this commonwealth; but if an inhabitant of this commonwealth goes into another jurisdiction to obtain a divorce for a cause occurring here while the parties resided here, or for a cause which would not authorize a divorce by the laws of this commonwealth, a divorce so obtained shall be of no force or effect in this commonwealth."³¹

17. *Cohen v. Cohen*, 318 Mass. 782, 64 N. E. 2d 689 (1946); *Coe v. Coe*, 316 Mass. 423, 55 N. E. 2d 702 (1944); cf. *Andrews v. Andrews*, 188 U. S. 14 (1903).

18. *Calhoun v. Calhoun*, 70 Cal. App. 2d 233, 160 P. 2d 923 (D. Ct. of App., 4th D. 1945).

19. *In re Codling's Estate*, 23 Wash. 2d 261, 160 P. 2d 635 (1945).

20. 45 N. Y. 535 (1871).

21. 290 N. Y. 31, 47 N. E. 2d 681 (1943); cf. *Pearson v. Pearson*, 230 N. Y. 141, 129 N. E. 349 (1920).

22. 138 App. Div. 269, 122 N. Y. Supp. 941 (1st Dep't 1910).

23. 225 N. Y. 709, 122 N. E. 892 (1919).

24. 235 N. Y. 14, 138 N. E. 490 (1923) (French divorce).

25. 272 N. Y. 407, 3 N. E. 2d 844 (1936).

26. 276 N. Y. 486, 12 N. E. 2d 170 (1937).

27. 276 N. Y. 296, 12 N. E. 2d 305 (1938).

28. 270 App. Div. 527, 60 N. Y. S. 2d 823 (2d Dep't 1946).

29. There exists, of course, a host of New York Supreme Court decisions in cases which never reached the Court of Appeals; it may suffice to refer to the most recent ones. *Holloway v. Holloway*, 187 Misc. 388, 63 N. Y. S. 2d 915 (Sup. Ct. 1946), 16 *FORD. L. REV.* 118 (1947), and *Verbeck v. Verbeck*, 187 Misc. 750, 63 N. Y. S. 2d 419 (Sup. Ct. 1946), *reargued*, 187 Misc. 750, 65 N. Y. S. 2d 265 (Sup. Ct. 1946).

30. Motion for appeal granted 270 App. Div. 906, 62 N. Y. S. 2d 618 (2d Dep't 1946).

Because of this New York policy, a foreign divorce involving New York citizens obtained with personal service³¹ on defendant and with participation of both parties in the proceeding, is given the same full faith and credit as a foreign decree rendered in compliance with the two *Williams* cases. This is one aspect of the New York doctrine. The *Davis v. Davis* case³² is illustrative of the binding effect of an adjudication by the court of rendition on the issue of domicile. The other aspect of the New York doctrine concerning foreign divorces of New York domiciliaries obtained upon personal service and participation of the parties follows as a corollary. Such a divorce has the same effect in New York that a foreign divorce is entitled to have in the foreign state if rendered after a square litigation over the question of plaintiff's domicile in the foreign jurisdiction. One must, however, keep in mind that this result for the latter category of divorces is derived from the general doctrine of *res judicata*,³³ whereas for the former it rests upon the particular public policy of New York.

The distinguishing feature between this class of foreign divorces and others which, like them, are defective in point of domicile, but are subject to the so-called estoppel effect, is the degree of efficacy which they have. We may summarize the consequences as follows:

First, where the divorce has been obtained abroad upon personal service and participation, it has a binding effect on everybody, not merely upon the parties and their privies. Therefore, it affects also their second spouses, if any.

Second, such divorce is deemed to have dissolved the previous mar-

There is more restricted language in the First Department in *Senor v. Senor*, 272 App. Div. 306, 65 N. Y. S. 2d 603 (1947). Recently, the First Department, in *Urquhart v. Urquhart*, 272 App. Div. 60, 69 N. Y. S. 2d 57 (1947), departed from the policy espoused in the *Shea* case by allowing an after-born child to claim its legitimacy as to "father" (divorced three years prior to child's birth and married to another woman than the child's mother).

31. See the reference to this point in *Solotoff v. Solotoff*, 269 App. Div. 677, 53 N. Y. S. 2d 510 (2d Dep't 1945), *motions for reargument and for leave to appeal denied*, 269 App. Div. 777, 55 N. Y. S. 2d 567 (2d Dep't 1945). Is not defendant's appearance before the foreign court a proper substitute for the requisite of personal service? It is certainly one by New York's internal law. (*Cf.* N. Y. Crv. PRAC. ACT § 237.) However, the language used by the courts requiring personal service on and appearance by the defendant in the foreign state seems to negative the substitutionary concept. But there is no case reported to the effect that appearance pending action without personal service would upset the foundation of New York's policy.

32. 305 U. S. 32 (1938).

33. RESTATEMENT, JUDGMENTS § 9, § 23, comment *d* (1942); *cf.* *Schneider v. Schneider*, 232 App. Div. 71, 249 N. Y. Supp. 131 (2d Dep't 1931), *aff'd*, 263 N. Y. 641, 189 N. E. 736 (1934).

riage for *all* purposes. Consequently, previous domestic decrees for separate support might be put to an end,³⁴ and

Third, there is no longer any legal basis for a prosecution for bigamy on account of a remarriage after such a divorce.

Fourth, there is no reason to distinguish between effects on the status on the one hand, and on so-called economic claims such as succession rights, or claims to death benefits under workmen's compensation law, on the other.³⁵

Parenthetically it may be added that rights of third persons, especially children, can never be affected by a divorce decree obtained in a state which has no personal jurisdiction over them. Thus, it may happen that the father's divorce abroad relieves him from a domestic support decree as against his wife; but it will not relieve him of the obligation to support the children. In absence of a new domicile abroad, the father's domestic domicile remains that of the children.³⁶

One warning must be given. The majority of the aforementioned types of cases are correctly decided, but the language used in the opinions is at times misleading. The court, for instance, disposed of a case so as to give the foreign divorce complete recognition; but the language used might be framed in terms of estoppel.³⁷

Sometimes, the courts refer to "comity" as the basis of their decision. This term is, as Cardozo said, a misleading word, responsible for much of the trouble.³⁸ Although in the formative era of conflict of laws it was probably an important consideration for the sovereign to have power to accept or to create a certain rule of law, this power ceased to be discretionary afterwards. The courts are no longer free to refuse the application of a rule pertaining to the recognition of foreign decrees, even if the rule is more liberal than that prevailing in other states.

It must be kept in mind, however, that the rule as established in New

34. *Cf. Franklin v. Franklin*, 295 N. Y. 431, 63 N. E. 2d 429 (1946). As far as the foreign decree determines alimony it is effective provided there was personal jurisdiction over the defendant. Thus, terms of private agreements incorporated in the foreign decree are to be given full effect in the home state. *Hoyt v. Hoyt*, 265 App. Div. 223, 38 N. Y. S. 2d 312 (1st Dep't 1942); *Schacht v. Schacht*, 295 N. Y. 439, 63 N. E. 2d 433 (1946); *Hess v. Hess*, 276 N. Y. 486, 12 N. E. 2d 170 (1937); *Glaser v. Glaser*, 276 N. Y. 296, 12 N. E. 2d 305 (1938); *Senor v. Senor*, 272 App. Div. 306, 65 N. Y. S. 2d 603 (1st Dep't 1947); *Rudolph v. Rudolph*, 66 N. Y. S. 2d 274 (Sup. Ct. 1946).

35. *City Bank Farmers Trust v. Adams*, 267 App. Div. 985, 48 N. Y. S. 2d 801 (1st Dep't 1944).

36. *Schneider v. Schneider*, 141 F. 2d 542 (App. D. C. 1944).

37. *E.g., McNeir v. McNeir*, 178 Va. 285, 16 S. E. 2d 632 (1941); *Borenstein v. Borenstein*, 272 N. Y. 407, 3 N. E. 2d 844 (1936).

38. *Loucks v. Standard Oil Co. of N. Y.*, 224 N. Y. 99, 111, 120 N. E. 193, 201 (1913).

York presupposes that the court of rendition is given jurisdiction over the subject matter by the legislature of its state.³⁹ This requirement amounts to the requisite of residence, at least for the plaintiff, in the state of rendition, since there is hardly any foreign statute without a residence requirement.⁴⁰

Another requirement has been stressed so often that it may suffice here merely to mention it. A personal appearance must be made by both parties to the action. Subsequent appearance of the defendant *nunc pro tunc* will not do, as the *Lindgren* case proved.⁴¹

Finally, as stated before, a litigation on the question of jurisdiction and a determination on this point are not requirements for the recognition of a decree which meets with the two other premises; but a real participation in the proceedings of the parties is indispensable.⁴² Where there was a mere general appearance without further participation by the defendant, the judgment may have those effects which will be referred to in the discussion of the second class or vulnerable foreign divorces, now to be considered.⁴³

III

Submission to the Jurisdiction by the Defendant Without Preceding Personal Service or Appearance

For want of a correct expression, the term estoppel is being misused to cover all classes, but particularly foreign divorces obtained without personal service and appearance. If one spouse procured a divorce abroad without the actual presence and participation of the other, two different situations may develop, with different results. First, the non-participating spouse may entirely disregard the divorce decree. Or, second, the non-participating spouse may by declaration or conduct

39. This is what the New York decisions, referred to in the notes 20-29 *supra*, considered as the foreign court's power over the subject matter. Howe, *The Recognition of Foreign Divorce Decrees in New York State*, 40 COL. L. REV. 373, 400 *et seq.* (1940).

40. New York, *e.g.*, CIV. PRAC. ACT § 1147, requires either residence or the connection of the parties with New York through the celebration of the marriage there.

41. Matter of Lindgren, 293 N. Y. 18, 55 N. E. 2d 849 (1944).

42. Verbeck v. Verbeck, 187 Misc. 750, 65 N. Y. S. 2d 265 (Sup. Ct. 1946); Rosenberg v. Perles, 182 Misc. 727, 50 N. Y. S. 2d 24 (Sup. Ct. 1944) does not contradict the proposition (first husband, although having entered an appearance, did not participate in the litigation). If by foreign procedural law an answer may test not only the merits of the action but also the jurisdiction of the court, the delivery of an answer which contests the jurisdiction, will not be regarded as participation in the litigation. Sullivan v. Sullivan, 66 N. Y. S. 2d 279 (Sup. Ct. 1946).

43. Lane v. Lane, 182 Misc. 656, 45 N. Y. S. 2d 540 (Sup. Ct. 1943).

show he has acquiesced in, if not acceded to, the decree. Let us take up the latter category first.

There is no question that appearance after decree, *nunc pro tunc*, or application to the foreign court afterwards, for example, for a modification of the alimony provision bars such party from challenging the decree.⁴⁴ So, undisputedly, does its procurement, or collaboration in its procurement. Utilizing the decree for a remarriage in no lesser degree proves submission to the jurisdiction of the court which had rendered it than the other acts just noted.⁴⁵ This consequence of a remarriage was quite recently once more illustrated in the *Carbulon* case.⁴⁶ It is the affirmative character of such acts which dispels any doubts about the submission of the non-procuring party to the jurisdiction of the divorce court.

Naturally, mere negative conduct is creative of conflicting views. Is continued failure to contest the validity of the foreign divorce tantamount to acquiescence? No answer generally valid can be given because the decision in the individual case will depend on its facts.⁴⁷ Where the silence of a spouse apprised of the divorce induced the procurer of the divorce to remarry, there is present not only the element of laches, but also that of acquiescence.⁴⁸

One will meet with some difficulties in predicting the significance which a court may give to the acceptance of pecuniary benefits by the non-procuring party, where the amount accepted is equivalent to that provided for in the decree.⁴⁹ Failure of a spouse during his life to impugn the validity of the foreign divorce procured by the other has been held to terminate a right to challenge it upon his death.⁵⁰

44. *Vernon v. Vernon*, 288 N. Y. 503, 41 N. E. 2d 792 (1942); *Matter of Lindgren*, 293 N. Y. 18, 55 N. E. 2d 849 (1944); *Chapman v. Chapman*, 224 Mass. 427, 113 N. E. 359 (1916).

45. *Carbulon v. Carbulon*, 293 N. Y. 375, 57 N. E. 2d 59 (1944); *Matter of Lindgren*, 293 N. Y. 18, 55 N. E. 2d 849 (1944); *Kelsey v. Kelsey*, 204 App. Div. 116, 197 N. Y. Supp. 371 (4th Dep't 1922), *aff'd*, 237 N. Y. 520, 143 N. E. 726 (1923); *Bruguiere v. Bruguiere*, 172 Cal. 199, 155 Pac. 988 (1916); *Matter of Estate of Bingham*, 265 App. Div. 463, 39 N. Y. S. 2d 756 (2d Dep't 1943); *Curry v. Curry*, 79 F. 2d 172 (App. D. C. 1935); *Horowitz v. Horowitz*, 58 R. I. 396, 192 Atl. 796 (1937).

46. *Carbulon v. Carbulon*, 293 N. Y. 375, 57 N. E. 2d 59 (1944).

47. For rejecting estoppel see *Pomerance v. Pomerance*, 187 Misc. 20, 61 N. Y. S. 2d 227 (Sup. Ct. 1946); *Golden v. Golden*, 41 N. M. 356, 63 P. 2d 928 (1937).

48. *Holmes, J.*, considered the divorce unassailable because of the failure of the petitioner to attack it during the life of the other spouse: *Brigham v. Dillaway*, 176 Mass. 223, 57 N. E. 328 (1900); *cf. Bliss v. Bliss*, 50 F. 2d 1002 (App. D. C. 1931).

49. Divorce held not subject to an attack in, *Guilmain v. Guilmain*, 58 N. Y. S. 2d 662 (Sup. Ct. 1945); *cf. In re Haga's Estate*, 229 Iowa 380, 294 N. W. 589 (1940).

50. *Holmes, J.*, in *Brigham v. Dillaway*, 176 Mass. 223, 57 N. E. 328 (1900); *cf. Hubbard v. Hubbard*, 228 N. Y. 81, 126 N. E. 508 (1920).

Besides the question of acquiescence in, or accession to the foreign decree, a second problem arises. Such connection with the foreign divorce decree presupposes apparent jurisdiction of the divorce court. Where the court lacked even color of jurisdiction when the decree was procured, not even procurement, nor, *a fortiori*, participation or subsequent acquiescence can foreclose attack upon that divorce. A decree obtained by mail-order or otherwise without any actual residence in a the foreign state, is void on its face. The significant thing here is the patent lack of jurisdiction.⁵¹

At this point it is now possible to propose the rationale for the group of decisions which we are discussing. As one can see, the rationale is cognate to that underlying the full recognition of foreign divorces rendered abroad against domiciliaries of New York upon personal service and participation in the proceedings. The state expresses its public policy in holding the parties to the divorce in either class. The difference is, as so often, one of degree. New York gives foreign divorces of the class previously discussed full faith and credit. However, the recognition of the group now under discussion is restricted, limited, and qualified.

Does the difference rest upon the kind of legal relations to which the effects of foreign divorces extend? Some dogmatist advanced the formula that the recognition of this class must be deemed to embrace only so-called economic claims. This position logically would give the divorcees the green light for litigating status actions once more,⁵² and hence would appear to be erroneous.

The cases usually presented as authority for the opposite opinion are *Vose v. Vose*,⁵³ *Querze v. Querze*,⁵⁴ and *Stevens v. Stevens*.⁵⁵ Suffice it to say that in the two first-mentioned decisions the divorces involved were similar to those in the *Shannon* case,⁵⁶ so-called Mexican divorces. Obviously, they were devoid of any effect upon status as well as upon succession rights. In the *Stevens* case, the wife brought a separation action, and the husband counter-claimed for divorce upon the ground of adultery. The court rejected the wife's objection, which was based on the husband's procurement of an *ex parte* divorce in Nevada. There

51. For cases and details on this topic, reference may be made to this writer's article, *Attacks of Vulnerable Foreign Divorces; Outposts of Resistance*, 21 N. Y. U. L. Q. REV. 457 (1946).

52. This is, if ever so qualified, often repeated, e.g., in *Cohen v. Randall*, 137 F. 2d 441 (C. C. A. 2d 1943).

53. 280 N. Y. 779, 21 N. E. 2d 616 (1939).

54. 290 N. Y. 13, 47 N. E. 2d 423 (1943).

55. 273 N. Y. 157, 7 N. E. 2d 26 (1937).

56. *Shannon v. Shannon*, 247 App. Div. 790, 286 N. Y. Supp. 27 (2d Dep't 1936).

was no remarriage on either part. The court hinted that the result might have been different by saying: "... we need not inquire what the result would be in some further event that has not happened."⁵⁷ There were no other facts showing any submission of the wife to the Nevada decree. In addition, the wife herself, by suing for separation had treated the foreign decree as a nullity. Under the circumstances, the foreign decree could not have any effects and as the Court of Appeals, commenting on the *Stevens* case in *Krause v. Krause*,^{57a} significantly pointed out, the case "would not control a different situation."

Such a different situation was presented to the Court of Appeals in *Vernon v. Vernon*.⁵⁸ There, also, the husband had sued for divorce in New York. The wife referred to a previous Nevada decree, obtained by her without personal service on the husband and without appearance on his part; he had, however, subsequently applied to the Nevada court for a modification of the decree with regard to the alimony clause. The mere fact of the application proved his submission to the foreign jurisdiction. If it were true that only economic claims are barred, where the foreign decree concerning domiciliaries was obtained without personal service and appearance, the Court of Appeals could not have dismissed plaintiff's divorce action.

Incidentally, the opinion of the Court of Appeals throws a brilliant light on the rationale as submitted here. The court, far from resorting to any estoppel concept, referred to the submission of the non-participating spouse to the foreign jurisdiction. Said the court: "... [The plaintiff] submitted himself to the jurisdiction of [that foreign state] . . . for the purpose of obtaining relief, [as to alimony and custody] and the result of such appearance in accordance with the laws of that [foreign] state was a final decree which was binding *upon him* and which should be given full faith and credit in the courts of the State of New York."⁵⁹

The last important point for a discussion on the group of cases characterized by the connection of both divorcees with the foreign decree, but without personal service, appearance, and participation in the action, concerns the effect of such decree upon third persons.

First, who is a third person? Certainly not the representative of one of the divorcees, as the Court of Appeals expressly stated in *Hynes v. Title Company*.⁶⁰ The same court took a different view, however, with respect to a child, a privy in blood, from that view shown against the executor or administrator, *i.e.*, privies in law. The infant child was

57. *Stevens v. Stevens*, 273 N. Y. 157, 159, 7 N. E. 2d 26, 27 (1937).

57a. 282 N. Y. 355, 26 N. E. 2d 290 (1940).

58. 288 N. Y. 503, 41 N. E. 2d 792 (1942).

59. (*Italics added*). *Id.* at 504.

60. 273 N. Y. 612, 7 N. E. 2d 719 (1937).

deemed not bound by a divorce decree which neither its father, the decedent, nor its mother could ever have disputed. This is the strange result reached by the court in *Matter of Lindgren*.⁶¹ In finding for the child against the claim of the decedent's second wife to letters of administration, the court said: "The divorce action brought by the decedent and the subsequent appearance therein [*nunc pro tunc*] by the wife did not suffice to confer upon the foreign divorce court jurisdiction of the subject matter."⁶² The court distinguished between the binding effect of the foreign decree upon the parents as parties who had submitted to the foreign jurisdiction, and the lack of a binding effect upon the child as a third person. In contrast, in *Hubbard v. Hubbard*,⁶³ the second husband's annulment action based upon the invalidity of the wife's foreign divorce from the first husband, obtained without personal service and appearance of the latter, was dismissed. At the time of this annulment action, the first husband was dead. The court made reference to the fact that he during his lifetime never disputed the divorce, and a further dispute must be held out of question, because the death dissolved the marriage anyway.

It is hardly understandable why the effect of a subsequent submission to a foreign decree should vary with the way of its expression.⁶⁴ If failure to challenge the decree during his lifetime by the non-participating spouse made the divorce unassailable even for the second spouse, one is puzzled by the *Lindgren* decision permitting successful challenge by a person whose status as a third party was at least disputable.

The *Hubbard* case introduced the second problem, that of attacks by a second spouse. Disregarding the *Hubbard* case, one reaches the conclusion that nothing short of submission to the foreign jurisdiction can stop him. This conclusion is borne out by the weight of authority. *Davis v. Davis* is usually quoted as the leading authority for this statement, although in this case the Court of Appeals contented itself with affirming the lower court without opinion.⁶⁵ The annulment action of the second husband met with complete success notwithstanding the fact that he, prior to his marriage, knew what kind of divorce decree would constitute the basis for his marriage. As a matter of fact, it was he who discovered that there was a possibility of his marrying the defendant by virtue of an *ex parte* divorce procured by defendant's spouse in Florida. The first husband, incidentally, had also remarried and had

61. 293 N. Y. 18, 55 N. E. 2d 849 (1944).

62. *Id.* at 24, 55 N. E. 2d at 851.

63. 228 N. Y. 81, 126 N. E. 508 (1920).

64. For this question see this writer's article, *supra* note 51.

65. 279 N. Y. 657, 18 N. E. 2d 301 (1938).

two children by his second wife. Another authority for regarding a second husband as a third party entitled to an annulment of his marriage is *Maloney v. Maloney*.⁶⁶

The New York courts will probably discard the identification of a second spouse with "a third party" only where such spouse actually, if ever so secretly, controlled the divorce proceeding, even though he didn't initiate it.⁶⁷ Here again, the rationale underlying the adjudications of this class of divorces supplies the key to the bewildering maze of apparently conflicting decisions. Nothing less than a connection of the second spouse himself with the divorce proceeding and, therefore, with the foreign jurisdiction, will deprive him of the right to challenge the divorce. By identifying himself with the foreign proceeding, he assumes in fact the position of a party.

This type of foreign decree has a double aspect. It is effective to preclude the parties from attacking it, but ineffective as far as third persons are concerned. *Mintz v. Mintz*⁶⁸ illustrates the consequences of the two features. There, in an action brought in New York by the second wife who was not connected with the divorce proceeding of the defendant, the second marriage was declared null and void because the Arkansas divorce pleaded by the defendant was regarded as invalid. Defendant's first wife, who had also remarried, was not made a party in this annulment proceeding. Thereafter, in the wake of the annulment judgment, the husband brought a separation action against his first wife. The Appellate Division affirmed the lower court which had dismissed this separation action. The reasoning of the Appellate Division may be epitomized as follows: What may show the foreign decree to be void with respect to the second wife, does not necessarily have this effect in an action between the divorcees themselves, who had submitted to the foreign divorce jurisdiction.⁶⁹ One can fairly say that the lot of those divorcees is not a happy one. On the one hand they have no capacity to re-marry because the new marriage would be held void. On the other hand, they are, as the decision shows, unable to get a separation or divorce. How can they be helped? It seems that they have to

66. 22 N. Y. S. 2d 334 (Sup. Ct. 1940), *aff'd*, 262 App. Div. 936, 29 N. Y. S. 2d 419 (4th Dep't 1941), *aff'd mem.*, 283 N. Y. 532, 41 N. E. 2d 934 (1942).

67. *Oldham v. Oldham*, 174 Misc. 22, 19 N. Y. S. 2d 667 (Sup. Ct. 1940).

68. 265 App. Div. 883, 38 N. Y. S. 2d 161 (2d Dep't 1942).

69. Neither is any of the parties to the divorce allowed to go behind the divorce decree, *i.e.*, collaterally to attack the validity of the marriage, the existence of which was the basis for the divorce decree. It was the divorce decree, therefore, which conclusively established the validity of the marriage. *Frost v. Frost*, 260 App. Div. 694, 23 N. Y. S. 2d 754 (1st Dep't 1940); *Scafidi v. Scafidi*, 57 N. Y. S. 2d 273 (Sup. Ct. 1945).

intermarry again, and to wait and to see whether the revamped marriage will have a happy end.

Concluding the discussion, one may ask whether the divorced party, although precluded from any attack on the divorce as against the other divorced party, could challenge the validity of his second marriage? The answer, of course, must be in the negative. Since the public policy considers the foreign court as competent to issue a decree binding upon the parties at least where both spouses submitted to its jurisdiction, neither of them can repudiate this binding effect of the foreign decree as to a third person, particularly a second spouse. As we saw, the second spouse is not hampered by the divorce decree from asserting its invalidity, but the parties to the divorce are not able to do so against him. This effect, resulting from the original decree and not from subsequent conduct of the divorcee, holds true regardless of whether the divorcee in any subsequent proceedings involving him and a third party, occupies the position of an attacker or of a defender. Thus, any attempt on the part of a divorcee to cast off the foreign decree must fail, no matter whether his cause of action is based upon the invalidity of the decree or whether he put in its invalidity as a defense.⁷⁰ Likewise, a charge of adultery laid by him against the new consort of his spouse, would have no different result.⁷¹

Summarizing, one may state the effects of this class of foreign divorces in which the defendant failed to appear but later submitted to the decree as follows:

First: The divorce obtained abroad without compliance with the domicile requirements of the forum has binding effect upon the divorcees and their privies in law.

Second: This result follows from the restricted recognition given such divorces by the forum if the foreign jurisdiction rests upon actual residence of the procuring party in the foreign state and unequivocal acts of submission to the exercise of the foreign jurisdiction by the non-participating party.

Third: Such foreign decree does not preclude third persons from challenging the validity of the divorce. Consequently, the divorced parties have no capacity to re-marry; to this extent their marriage still exists.

Fourth: The right to attack, generally given to third parties, is denied such persons who, either secretly or open and avowedly, procured the divorce and thus identified themselves with the foreign jurisdiction.

70. *Brown v. Brown*, 242 App. Div. 33, 272 N. Y. Supp. 877 (4th Dep't 1934), *aff'd mem.*, 266 N. Y. 532, 195 N. E. 186 (1935).

71. *Lacey v. Lacey*, 38 Misc. 196, 77 N. Y. Supp. 235 (Sup. Ct. 1902).

Fifth: Within the limits indicated in the four preceding paragraphs, the decree is given the effect of barring not only economic claims of the spouses, but also any action of either party for an adjudication of the marital status.

IV

Ex parte Decrees without Subsequent Acts of Submission by Defendant

The last group of foreign divorces to be considered are the vulnerable decrees obtained abroad by one party without defendant's appearance, then or later, and without his doing any other act which could be regarded as a subsequent submission to the proceedings. There is no reason for the domiciliary state to protect such a divorce from attacks against its effectiveness. In the view taken by the attacker, the foreign court lacked the power to change the matrimonial status of the defendant. By adding the weight of the policy formulated by the home state to his individual interest, surely the momentum of his attack is greatly reinforced. The domiciliary state has no reason to respect the foreign divorce proceeding which, aside from the inadequacy of its jurisdictional basis over the subject matter, took place without consent or ratification by the other party.

If this be true, then there is no ground for denying to either party access to a domiciliary court for the purpose of an adjudication of the matrimonial status. The conduct of the spouse who had applied to the foreign court does not suffice to prevent a competent court from vindicating the strong public policy of the domiciliary state in settling status questions of its citizens. Accordingly, it was held in *Stevens v. Stevens*,⁷² that even the party procuring such an assailable divorce has the right to bring a new action for divorce in the forum. When, later, the Court of Appeals in another case⁷³ referred to the fact that Mr. Stevens' new divorce action was parallel to his former Nevada action in its objective, the court admitted, nevertheless, the inconsistency between his new procedural theory and that adopted by the Nevada decree. In order to prevail in New York, Mr. Stevens had to prove the existence of a marriage which, according to the Nevada decree, had been dissolved.

All the more, of course, is the defendant not prevented from claiming his rights based upon the existence of the marriage, such as that to separation or divorce. These rights are not limited by a re-marriage of the party procuring the foreign divorce.⁷⁴

72. 273 N. Y. 157, 7 N. E. 2d 26 (1937).

73. *Krause v. Krause*, 282 N. Y. 355, 26 N. E. 2d 290 (1940).

74. *Matter of Holmes*, 291 N. Y. 261, 52 N. E. 2d 424 (1943).

A fortiori, third persons, such as the second spouse of the party procuring the decree, will encounter no difficulties in having this second marriage declared null and void by reason of the invalidity of his spouse's divorce. The leading cases in New York are *Lefferts v. Lefferts*⁷⁵ and *Fischer v. Fischer*.⁷⁶ In both cases, the second spouse's right to attack the validity of the other spouse's divorce was recognized, notwithstanding the important role which they had played in procuring the divorces. Obviously, one ought not to find any logical difficulties in conceding to them the right to attack the divorce, if one bears in mind that not even the procuring party has been denied this right.

For this reason, a differentiation depending upon whether the second spouse challenges the divorce as a plaintiff or as a defendant, lacks any legal basis or justification.⁷⁷ By the same token, it would be erroneous to make a distinction between an attack upon the validity of the divorce by a second spouse and an attack by any other interested third party, such as the relatives of a decedent second spouse.⁷⁸

The described effects follow from the forum's refusal to recognize the right of the divorce court to the exercise of jurisdiction. To put it more strongly, one may say that the forum considers the exercise of such jurisdiction by the foreign court as an usurpation rather than as a merely erroneous assumption of the existence of plaintiff's domicile in the state. For the same reason, the avenues to collateral attacks on the decree at any time by anybody have been opened.

75. 263 N. Y. 131, 188 N. E. 279 (1933).

76. 254 N. Y. 463, 173 N. E. 680 (1930).

77. This can be seen on the one hand from *Davis v. Davis*, 279 N. Y. 657, 18 N. E. 2d 301 (1938); *Brunel v. Brunel*, 64 N. Y. S. 2d 295 (Sup. Ct. 1945); *Heusner v. Heusner*, 181 Misc. 1015, 42 N. Y. S. 2d 850 (Sup. Ct. 1943) (second spouse was plaintiff); and on the other hand from *Lefferts v. Lefferts*, 263 N. Y. 131, 188 N. E. 279 (1933); *Fischer v. Fischer*, 254 N. Y. 463, 173 N. E. 680 (1930); *Honig v. Honig*, 267 App. Div. 908, 47 N. Y. S. 2d 623 (2d Dep't 1944), *dismissed for failure to prosecute appeal*, 293 N. Y. 856, 59 N. E. 2d 444 (1944); *Maloney v. Maloney*, 22 N. Y. S. 2d 334 (Sup. Ct. 1940), *aff'd*, 262 App. Div. 936, 29 N. Y. S. 2d 419 (4th Dep't 1941), *aff'd*, 288 N. Y. 532, 41 N. E. 2d 534 (1942); *Brown v. Brown*, 164 Misc. 792, 299 N. Y. Supp. 487 (Sup. Ct. 1937) (second spouse was defendant). *Contra* is only *Heller v. Heller*, 259 App. Div. 852, 19 N. Y. S. 2d 509 (2d Dep't 1940), *aff'd*, 285 N. Y. 572, 33 N. E. 2d 247 (1941). (Continuation of the marriage by the second husband after his discovery of the vulnerability of his wife's divorce held barring his annulment action.) And there are a few decisions of the lower courts to the effect that a second spouse who procured the divorce of his spouse from his first consort is deemed to be precluded from challenging the validity of the divorce. *Kaufman v. Kaufman*, 177 App. Div. 162, 163 N. Y. Supp. 566 (1st Dep't 1917); *Pandelides v. Pandelides*, 182 Misc. 819, 47 N. Y. S. 2d 247 (Sup. Ct. 1944); *Oldham v. Oldham*, 174 Misc. 22, 19 N. Y. S. 2d 667 (Sup. Ct. 1940).

78. *E.g.*, *Bell v. Little*, 204 App. Div. 235, 197 N. Y. Supp. 674 (4th Dep't 1922), *aff'd mem.*, 237 N. Y. 519, 143 N. E. 726 (1923).

Although this analysis is valid as to questions of status, it is not suggested that the same approach is required for questions concerning economic claims. Why? Because the lack of personal jurisdiction is decisive for matters of maintenance and support. In most states, support orders granted in marital cases survive the pronouncement of divorce decrees and the enforcement of separation agreements. If, exceptionally, such orders and agreements terminate on divorce (for example, where they are expressly limited to "the duration of the marriage") such a termination presupposes an attack-proof foreign divorce decree. The Supreme Court of the United States last held to this effect in the *Esenwein* case.⁷⁹ It is, therefore, clear that foreign divorce decrees of the type here defined, vulnerable as they are, cannot put domestic support orders or separation agreements out of effect.⁸⁰ Where such orders or agreements, as in New York, do not end on divorce, a foreign divorce decree, even though it is fully enforceable under both *Williams v. North Carolina* cases, cannot supersede the former alimony order or separation agreement, unless it is issued on personal jurisdiction over both spouses.⁸¹ Whether or not the foreign decree made any provision for the support of wife and children will be immaterial.⁸²

Statutory provisions make clear that the procurement of a foreign divorce which is not recognized has the same destructive effect upon succession rights created by operation of law as a recognized divorce necessarily would produce.⁸³

Much as the topics previously discussed seem to point to the absolute legal ineffectiveness of a foreign decree obtained *ex parte* and without subsequent submission by the defendant, such a conclusion must not be accepted without some qualification. A consideration of two other aspects of divorces of this kind is necessary to prevent too broad a statement of the doctrine.

In the first place, we are faced with the general principle, so assiduously repeated by the Supreme Court, that the jurisdiction of the foreign court over the subject matter is to be presumed unless disproved by extrinsic evidence or by the record itself.⁸⁴ In particular, the recent de-

79. *Esenwein v. Pennsylvania*, 325 U. S. 279 (1945).

80. *Durlacher v. Durlacher*, 123 F. 2d 70 (C. C. A. 9th 1941); *Russo v. Russo*, 62 N. Y. S. 2d 514 (City Ct. 1946), 47 Col. L. Rev. 158 (1947).

81. *Pennoyer v. Neff*, 95 U. S. 714 (1878).

82. Douglas, J., concurring in *Esenwein v. Pennsylvania*, 325 U. S. 279 (1945), referring to *Pennoyer v. Neff*, 95 U. S. 714 (1878). To the same effect, *Estin v. Estin*, 63 N. Y. S. 2d 476 (Sup. Ct. 1946), *aff'd mem.*, 271 App. Div. 829, 66 N. Y. S. 2d 421 (2d Dep't 1947).

83. N. Y. DECEDENT ESTATE LAW §§ 18 (3), 87 (b).

84. *Milliken v. Meyer*, 311 U. S. 457 (1940); *Adam v. Saenger*, 303 U. S. 59 (1933); *German Saving and Loan Society v. Dormitzer*, 192 U. S. 125 (1904).

cision of the Court of Appeals in *Matter of Holmes*,⁸⁵ presents an important development in this direction. There, in 1939 the first wife obtained in the domicile, New York, a divorce after her husband had two years previously procured a Nevada divorce *ex parte* and had re-married. In 1942, the second wife died intestate. Her sister, disputing the husband's claim to letters of administration, challenged the validity of his second marriage with reference to the New York divorce decree rendered after the marriage with her sister. The Court of Appeals held that the decedent's sister must accord the earlier Nevada divorce full recognition until impeached by preponderant evidence that the decedent's husband had no domicile in Nevada at the time when he obtained a divorce there. In other words, the court decided that the Nevada decree, although incapable of dissolving the marriage of the first wife, maintained its presumptive effect on any other interested person who, like the sister, was not a party to the New York divorce proceeding.⁸⁶ The suggestion that the husband should be held estopped from claiming his share in his second wife's estate was expressly rejected by the highest court in New York.

The rationale of this holding is here again that of the extent of recognition given to the foreign decree. The difference between the first two classes and the third class of foreign divorces does not lie in the rationale; it lies rather in the kind of limitation placed upon the recognition of the foreign decree. In the previously discussed cases the limitation ran to the incidence of the divorce; here, it is the length of time for which the foreign divorce is to be recognized. In this latter situation the foreign divorce loses its effect only upon the successful challenge.

With this distinction, we turn to the second and last problem. Does the procurer of the foreign decree also have the right to put its effect to an end by challenging the validity of the decree for which he himself had applied in the foreign court? If the *Stevens* case is still the law, the answer will be in the affirmative. Yet, the procurer of the foreign decree in this case challenged its validity before he re-married. Thus the case presented the conflict between only two policies. On the one hand, the courts have, in general, been reluctant to grant that party standing to repudiate a foreign judgment, where he himself had invoked the foreign jurisdiction.⁸⁷ On the other hand, the state has a preeminent interest

85. *Matter of Holmes*, 291 N. Y. 261, 52 N. E. 2d 424 (1943), *affirming* 265 App. Div. 1033, 41 N. Y. S. 2d 172 (4th Dep't 1943), the Appellate Division had reversed the Surrogate's order denying the husband's claim.

86. *Id.* at 273, 52 N. E. 2d at 430.

87. *Blackburn, J.*, in *Schibsby v. Westenholz*, L. R. 6 Q. B. 155, 161 (1870).

in the control over the matrimonial relations of its citizens. Shall the former interest be subordinated to the latter even when another preponderant interest claims attention? This third interest is that which arises when the claimant enters upon a second marriage after having obtained a foreign divorce which was presumptively effective at home. In the *Krause* case,⁸⁸ the Court of Appeals said that this third interest, strengthened by the weight of the anti-repudiation rule, must still be balanced against the interest of the domiciliary state in the control of the original marital status even when this status is relied upon by its erstwhile repudiator.

Note that at the time when the court held that Mr. Krause could not get away scotfree from the pecuniary obligations inherent in his new marriage, the *Haddock*⁸⁹ doctrine exerted its sway all over this country. The foreign decree at that time showed on its face its unenforceability in New York. At present, the unenforceability of a foreign decree, even if obtained without personal service on the defendant and without any participation or submission to the jurisdiction on his part, depends upon evidence disproving the existence of plaintiff's domicile in the foreign state. If the former spouse or the present spouse of the party who procured the decree does not take up the cudgel against the validity of the divorce, it will be very hard for the procurer of the divorce to overcome the admissions presented in his declarations which were given under oath in the foreign proceeding.

Where the burden to disprove his foreign domicile at the time of the divorce is placed upon him, he will hardly dare to demand a judgment as to his marital status. Why? Whether he demands it in a direct action or in an counterclaim only, his adversary may compel him to face a jury trial. It does not take great imagination to predict the verdict.

Consequently, even if the hero of such cases confined his impugnement of the divorce to a defense to the support and separation action of his second wife, it is not difficult for the court to charge him with the support obligation, without any adjudication of his marital status respecting his first wife.

Thus, a balancing of conflicting public policies, and the force of a foreign divorce not yet shaken in its foundation, and considerations adumbrated before, combine to strengthen the rule suggested by the *Krause* case and carried further in *Matter of Holmes*. Little space is therefore left for "estoppel." It is no longer a wrong to establish a separate domicile in a foreign state, even if the other spouse was not guilty

88. *Krause v. Krause*, 282 N. Y. 355, 26 N. E. 2d 290 (1940).

89. *Haddock v. Haddock*, 201 U. S. 562 (1906).

of any misconduct. To preclude the procurer of a foreign divorce from the right to attack his new marriage is not to penalize him who might have acted in good faith, or to reward his second wife who might have been instrumental in procuring the divorce. In this class of divorces the result is also dependent upon the efficacy of the vulnerable foreign divorce, and the degree of its efficacy is determined by the public policy, which varies with the facts upon which the foreign court claimed jurisdiction.

From the foregoing analysis, one may reach the following conclusions:

First: A divorce decree obtained upon alleged domicile by one spouse, but without any present or subsequent submission to the divorce jurisdiction by the other, is subject to attacks by the latter or by any third person, new spouses or non-spouses alike.

Second: The right of the procurer to impugn his foreign divorce is qualified by his entering into a second marriage at a time when the divorce decree was not yet declared invalid. The economic rights of the second spouse are regarded as immune from his attacks upon the foreign decree which purported to dissolve his first marriage.

Third: The burden of disproving the jurisdictional fact upon which the foreign decree was rendered lies upon the challenger. Therefore, a subsequent judgment rendered in the domiciliary state in a status action brought by the non-participating spouse acquires no significance beyond the litigants as far as the jurisdictional facts are concerned. Until a third person meets that burden, the foreign divorce may still display its efficacy.

Fourth: Statutorily, by the mere fact of procuring the foreign divorce, a spouse loses any title to economic claims based upon the marital relationship, whereas such claims against him or his estate are saved to the other spouse.

Conclusion

Where one problem placed frequently before the courts has produced a vast and ever increasing body of reported material, it may suggest its intricate nature or it may prove the inadequacy of exploration and guidance to cope with the realities of the problem. The first suggestion recalls Mr. Justice Frankfurter's thesis which served as the keynote for this paper.

The second suggestion offers a plan whereby one may look for a direction. It was the purpose of this paper to submit a rationale for a body of law that seemingly shows such irrational features as to baffle any attempt to predict the results in individual cases.

Of course, the answer to the question whether judicial opinions evince

a doctrinal rationale (which means the stated *fundamentum classificationis*) depends upon the test of its practicability. If the classification, in fact if not in words, conditions the results arrived at in the individual cases, it proves its rational character. Is it not the function of a rationale to dissipate the great fear haunting the lawyers, the fear that a plethora of authorities makes it impossible to venture a prediction of what the courts might do in the case submitted to the lawyer's advice?

There is no need for a summary because for every one of the three classes of divorces the results arrived at have been stated. What is not discussed in this paper is the treatment of such divorces in a third state, a state which is neither the state of rendition nor the state of domiciliary origin.⁹⁰ However, this is a subject which requires special observation and discussion. The same is true of the question of fraud and collusion and its influence on the jurisdictional problems discussed here; it is of general significance in the conflict of laws and is not restricted to the part devoted to foreign divorces.

90. This problem has been discussed in this writer's article, *supra* note 51.

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